

The American Influence on International Arbitration

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It is a curious fact that the Americanization of international arbitration is a topic that is often felt but rarely discussed.¹ If we in the arbitration community do discuss it, we typically do so casually over drinks, rarely in a formal setting such as a law school symposium. Certainly, it is indisputable that the international arbitration world is an identifiable epistemic community that transcends national borders, and whose members are shaped by their own experience. Increasingly, that experience reflects an American influence, be it heritage, training, affiliation, or client base. This being the case, why not admit it openly and reflect upon the import of this trend?

One can only guess as to why this topic has merited so little attention, particularly in light of the redundant and superfluous discussions that are typical fare at many an arbitration conference. Given the overwhelming American influence in the world today, perhaps the silence reflects a desire among American arbitrators to avoid a public display of hubris. Perhaps it reflects among non-American arbitrators a desire to avoid a public display of resentment. Or perhaps it reflects simple apathy, as the arbitration community is not given to self-reflection, preferring instead to focus on the substance of our livelihood rather than the sociology of our collective lives. Perhaps it reflects a timidity within this tight-knit community, as we wish to avoid public discussion of subjects that divide us and focus instead upon legal developments that unite us. Why embark on treacherous waters to face the fractures within our college when we could remain anchored in the safe harbor of yet another discussion of *Chromalloy*² and *Hilmarton*?³

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¹ The only significant treatment of the issue is by Lucy Reed and Jonathan Sutcliffe. See Lucy Reed & Jonathan Sutcliffe, *The "Americanization" of International Arbitration?*, 16 MEALEY'S INT'L ARB. REP. 36, 36 (2001); see also Nicolas C. Ulmer, *A Comment on "The 'Americanization' of International Arbitration?"*, 16 MEALEY'S INT'L ARB. REP. 24, 24-25 (2001).

² *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907 (D.C. 1996).

Frankly, I share such resistance. The sociology of international arbitration is not a priority of the first order in my intellectual pursuits. Moreover, much of my legal career has been spent living and working in Europe, where I learned to greatly appreciate the vitality and virtues of dispute resolution as practiced on that continent. Were it not for this symposium and the effective persuasion of Professor Mary Ellen O'Connell to secure my participation, my ruminations on this topic would be few and fettered. Nonetheless, as always, she is persuasive, and I therefore happily will explore this virgin territory.

In preparing my comments, I must say that my initial reaction to the theme is one of skepticism. Skepticism in part based on the implicit assumption inherent in the theme that only recently has international arbitration felt the weight of U.S. influence. To say that international arbitration is becoming "Americanized" is to suggest that it was not "American" in the past.

But skepticism also in the sense that it suggests that international arbitration is becoming "Americanized," as if there is only one influence on international arbitration. Anyone with any significant exposure to international arbitration knows that there are many rivers that flow into this delta, not just the Hudson, but also the Thames, the Seine, the Rhine, the Amazon, the Yangtze, and the Nile. One could just as easily have a symposium on how international arbitration is truly becoming more Asian, more Latin, more multi-cultural than ever before.

Having said that, it is indisputable that the American influence is growing in international arbitration. The principal instrument for that influence is the meteoric rise of the American law firm in the global market place. The style, technique, and training of lawyers based in these firms dramatically influences the manner in which international arbitration is conducted. It is the soft-power of these firms that is one of the defining features of international arbitration as we know it today.

I. THE FLOW AND EBB OF AMERICAN INFLUENCE

Let me first address the assumption that international arbitration is only now becoming Americanized. Some may assume that past decades have not witnessed the American influence of international arbitration to the same degree that we have seen in recent years. To be sure, there have been periods when the American influence on international arbitration has ebbed, rather

³ *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation OTV*, 20 Y.B. Com. Arb. 663 (U.K. v. Fr. 1995) (Int'l Council for Com. Arb.).

than flowed. The singular event of the past fifty years in international commercial arbitration undoubtedly was the signing of the New York Convention in 1958.⁴ The United States was largely absent at creation. The United States “did not attempt to exert a strong influence on the content of the convention, confining itself to exposition of its views on matters of basic principle.”⁵ Perusing the *travaux préparatoires* of the New York Convention underscores this conclusion.⁶ The United States never

bothered to comment on the work of the Ad Hoc Committee and initially resolved not to take part in the Conference. Although the United States ultimately sent a delegation to the Conference . . . it took no part in any of the working sessions . . . [and] declined even to cast a vote on the question of whether the Conference should adopt the final text of the Convention as a whole.⁷

Even when the United States did finally accede to the Convention, it did so a dozen years later, by which time forty-four other countries were already signatories.⁸ Thus, the United States has had little influence in the drafting

⁴ See, e.g., Alan Redfern, *Having Confidence in International Arbitration*, 57 DISP. RESOL. J. 60, 60–61 (2003) (New York Convention “has been described as the single most important pillar on which the edifice of international arbitration rests” and “perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law.”) (internal quotes omitted).

⁵ 1960 A.B.A. SEC. INT’L & COMP. L. PROC. 210, *quoted in* IAN MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 160–61 (1992).

⁶ See Charles H. Brower II, *What I Tell You Three Times Is True: U.S. Courts and Pre-Award Interim Measures Under the New York Convention*, 35 VA. J. INT’L L. 971, 1005, 1012–21 (1995) (footnotes omitted).

⁷ *Id.* at 1020 (footnotes omitted).

⁸ For a list of countries that are parties to the New York Convention, with dates of accession, see United Nations Commission on International Trade Law (UNCITRAL), *Status of Conventions and Model Laws*, available at <http://www.uncitral.org/english/status/status-e.htm> (last visited Sept. 20, 2003). For a discussion of the reason the United States was reluctant to play an active role in the Convention or accede shortly thereafter, see Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 GEO. WASH. INT’L L. REV. 17, 29–30 (2002). Karamanian noted that the U.S. delegation was concerned that:

[f]or the United States to benefit, the Convention would need to override state anti-arbitration laws, which would require changes in state and possibly federal court procedural rules. The delegation was also concerned that the United States lacked a “sufficient domestic legal basis” for accepting the Convention and that the Convention embodied undesirable principles of arbitration law.

and early developments of the New York Convention. It is unfortunate that this monumental achievement perhaps reflects the low-water mark of American influence on the arbitration world.

But if one takes a longer look, the American shadow looms large. It is widely recognized that the modern era of international arbitration finds its genesis in the Jay Treaty of 1794, which established commissions to resolve disputes between the United States and Great Britain through the arbitration of claims by British creditors against U.S. nationals.⁹ With a potential war with Britain looming over the U.S. failure to compensate British creditors, George Washington commissioned Chief Justice John Jay to negotiate a compromise. The treaty obligated the United States to pay full compensation and to adjudicate these claims before a panel of five commissioners, two appointed by each country and the fifth by unanimous consent.¹⁰ When news of the terms of the treaty broke, there were literally mobs in the streets. Chief Justice John Jay was declared a traitor and burned in effigy. George Washington's reputation was assailed as never before, with Thomas Jefferson describing the treaty as a "monument of venality."¹¹

If the Jay Treaty was much maligned then, it is much beloved today. The arbitral commissions established under the Jay Treaty were the beginning of the modern era of international arbitration.¹² Many of the features utilized in that treaty will sound familiar today. They include: (1) the ineffectiveness of domestic courts precipitated recourse to international arbitration;¹³ (2) the

⁹ Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, U.S.-Gr. Brit., arts. V, VIII, 8 Stat. 116, 119-20, 122 [hereinafter Jay Treaty].

¹⁰ *Id.*

¹¹ DAVID MCCULLOUGH, JOHN ADAMS 457 (2001). Elsewhere Jefferson described the treaty as "nothing more than a treaty of alliance between England and the Anglomen of this country against the legislature and people of the United States." JOSEPH ELLIS, THE AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 158-59 (1996). More than any other event the signing of the Jay Treaty led Thomas Jefferson out of retirement to declare his candidacy as president. He saw the Jay Treaty, with federal assumption of pre-revolutionary private debt and pro-English version of American neutrality, as a repudiation of the Declaration of Independence, the Franco-American alliance, and all the political principles on which Jefferson had staked his public career. *See id.* at 159.

¹² *See* Barton Legum, *Investment Disputed and NAFTA Chapter Eleven*, 95 AM. SOC'Y INT'L L. PROC. 196, 204 (2001); *see also* Jonathan I. Charney, *Third Party Dispute Settlement and International Law*, 36 COLUM. J. TRANSNAT'L L. 65, 68 (1997) ("The Jay Treaty of 1794 marked the beginning of modern international arbitrations, which have continued to the present."); Barton Legum, *Emerging Fora for International Litigation (Part 1): The Innovation of Investor-State Arbitration Under NAFTA*, 43 HARV. INT'L L.J. 531, 534-35 (2002).

¹³ Jay Treaty, *supra* note 9, art. VI, at 119:

utilization of party-appointed arbitrators and a chair selected by those arbitrators;¹⁴ (3) arbitrator declarations affirming their impartiality and independence;¹⁵ (4) the payment of arbitrators to be shared equally by both sides;¹⁶ (5) the manner of replacement of arbitrators;¹⁷ (6) discovery techniques including oral testimony, written depositions, and document

Whereas it is alleged . . . that by the operation of various lawful impediments since the peace, not only the full recovery of the said debts has been delayed, but also the value and security thereof have been, in several instances, impaired and lessened, so that by the ordinary course of judicial proceedings, the British creditors cannot now obtain, and actually have and receive full and adequate compensation for the losses and damages which they have thereby sustained.

¹⁴ *Id.* at 119–20:

For the purpose of ascertaining the amount of any such losses and damages, five Commissioners shall be appointed, and authorized to meet and act in manner following, viz.: Two of them shall be appointed by his Majesty, two of them by the President of the United States by and with the advice and consent of the Senate thereof, and the fifth by the unanimous voice of the other four; and if they should not agree in such choice, then the Commissioners named by the two parties shall respectively propose one person, and of the two names so proposed, one shall be drawn by lot, in the presence of the four original Commissioners.

¹⁵ *Id.* at 120:

When the five Commissioners thus appointed shall first meet, they shall, before they proceed to act, respectively take the following oath, or affirmation, in the presence of each other; which oath, or affirmation, being so taken and duly attested, shall be entered on the record of their proceedings, viz.: I, A. B. one of the Commissioners appointed in pursuance of the sixth article of the Treaty of Amity, Commerce, and Navigation, between his Britannic Majesty and the United States of America, do solemnly swear (or affirm) that I will honestly, diligently, impartially, and carefully examine, and to the best of my judgment, according to justice and equity, decide all such complaints, as under the said article shall be preferred to the said Commissioners: and that I will forbear to act as a Commissioner, in any case in which I may be personally interested.

¹⁶ Jay Treaty, *supra* note 9, art. VIII, at 122:

It is further agreed, that the Commissioners mentioned in this and in the two preceding articles shall be respectively paid in such manner as shall be agreed between the two parties, such agreement being to be settled at the time of the exchange of the ratifications of this treaty. And all other expenses attending the said Commissions shall be defrayed jointly by the two parties, the same being previously ascertained and allowed by the majority of the Commissioners.

¹⁷ *Id.* (“And in the case of death, sickness or necessary absence, the place of every such Commissioner respectively shall be supplied in the same manner as such Commissioner was first appointed, and the new Commissioners shall take the same oath or affirmation and do the same duties.”).

production;¹⁸ (7) determinations to be made not simply as law mandates, but as equity and justice require;¹⁹ (8) the finality of awards;²⁰ and (9) the commitment by the non-prevailing party to honor the award.²¹

Subsequent mixed claims commissions served to crystallize international arbitration in the 19th and early 20th centuries. The *Alabama* cases concerned allegations that England had violated its neutrality between the United States Government and the Confederate Government during the American Civil War by destroying U.S. commercial vessels. These cases represent among the most important and earliest arbitral tribunals to apply international law.²² As one commentator has put it,

For about two centuries [during the 17th and 18th centuries], international adjudication in the real sense fell in abeyance . . . This situation, which

¹⁸ Jay Treaty, *supra* note 9, art. VI, at 120:

And the said Commissioners shall have power to examine all such persons as shall come before them, on oath or affirmation, touching the premises; and also to receive in evidence, according as they may think most consistent with equity and justice, all written depositions, or books, or papers, or copies, or extracts thereof; every such deposition, book, or paper, or copy, or extract, being duly authenticated, either according to the legal forms now respectively existing in the two countries, or in such other manner as the said Commissioners shall see cause to require or allow.

¹⁹ *Id.*:

The said Commissioners in examining the complaints and applications so preferred to them, are empowered and required, in pursuance of the true intent and meaning of this article, to take into their consideration all claims, whether of principal or interest, or balances of principal and interest, and to determine the same respectively, according to the merits of the several cases, due regard being had to all the circumstances thereof, and as equity and justice shall appear to them to require.

²⁰ *Id.* ("The award of the said Commissioners, or of any three of them as aforesaid, shall in all cases be final and conclusive, both as to the justice of the claim, and to the amount of the sum to be paid to the creditor or claimant.").

²¹ *Id.* ("[A]nd the United States undertake to cause the sum so awarded to be paid in specie to such creditor or claimant without deduction; and at such time or times, and at such place or places, as shall be awarded by the said Commissioners . . .").

²² See JACKSON H. RALSTON, *INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO 197-200* (1929). The arbitral panel was one of the earliest to apply international law to determine whether indirect damages resulting from international law violations of neutrality were compensable. The United States argued that in addition to direct loss from destruction of U.S. vessels, Britain should also compensate the United States for (1) expenses incurred in pursuing British cruise vessels; (2) loss in transfer of American commercial marine; (3) enhanced payments of insurance; (4) prolongation of the war; and (5) suppression of rebellion. See *id.* at 199; see also 6 JOHN BASSET MOORE, *A DIGEST OF INTERNATIONAL LAW* § 1050, at 999 (1906).

some authors refer to as “the catastrophe” in relating the history of arbitration, continued until the advent of a young republic, the United States of America, bringing with it new ideas about settling disputes: first, in the Jay Treaty of 1794, following the War of Independence, which introduced binding decisions by joint mixed commissions; then again in the Alabama arbitration of 1872 after the American Civil War, which can be considered the real beginning of modern international arbitration, in the technical sense.²³

The United States also had a decisive role in the establishment of the first standing arbitral body, the Permanent Court of Arbitration (PCA). At the Hague Peace Conference of 1899, the superpowers of the day were at loggerheads over the establishment of such a tribunal. Germany was strongly opposed to arbitration, believing that “arbitration through interested judges . . . [is] nothing but intervention” and “that courts of arbitration would result in bringing up the interests of different countries, forming groups for war, and taking advantage of the weaker group.”²⁴ Intervention from the United States delegation was critical to securing Germany’s support, leading to the establishment of the PCA.²⁵ Moreover, in its early years no nation referred any cases to the PCA for determination, and many believed it would be a failure. The United States was the first to refer a case to the PCA concerning expropriation by Mexico of Catholic funds used to fund the building of missions in Upper and Lower California.²⁶ Subsequent disputes were submitted to the PCA at the behest of the United States.²⁷

Theodore Roosevelt’s Secretary of State, Elihu Root, received the Nobel Peace Prize in 1912 in recognition of, among other things, his efforts to establish international arbitration as an accepted practice among states. In his Nobel Lecture, Root underlined “the value of having this [arbitration] system a part of the common stock of knowledge of civilized men, so that, when an international controversy arises, the first reaction is not to consider war but to

²³ Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT’L L. & POL. 919, 921–22 (1999).

²⁴ RALSTON, *supra* note 22, at 255.

²⁵ *Id.* at 255–56.

²⁶ *Id.* at 263–64.

²⁷ For example, in 1903, President Theodore Roosevelt was invited to arbitrate a number of claims brought by European countries against Venezuela regarding nonpayment of debt. President Roosevelt suggested arbitration in The Hague under the auspices of the PCA. See MOORE, *supra* note 22, § 967, at 590–91; see also EDMUND MORRIS, THEODORE REX 191–92, 207–08 (2001).

consider peaceful litigation.”²⁸ He then urged the “next advance . . . along this line is to pass on from an arbitral tribunal . . . to a permanent court composed of judges who devote their entire time to the performance of judicial duties.”²⁹

A few short years later the United States was instrumental in creating just such a permanent court. Of course, Woodrow Wilson was the principal architect of the League of Nations, which included the Permanent Court of International Justice (PCIJ). Although the United States did not become a member of the League for reasons that are well known, the United States was critical in the creation of the PCIJ—even when it was clear the United States would not join the League.

The early influence of the United States was not limited to institution building. In the early 20th century, the United States was at the forefront in establishing substantive principles that insured the efficacy of international arbitration. For example, in the middle part of the 20th century attempts were made to undermine the substantive rights of foreign investors through doctrines such as the Calvo Clause, national treatment, and “appropriate compensation” (*i.e.*, less than full).³⁰ In response, the United States developed doctrines such as the international minimum standard and the Hull formula, which guaranteed prompt, adequate, and effective compensation for deprivation of property rights.³¹ These substantive developments were critical to the protection of foreign investment and the success of international arbitration.

²⁸ ELIHU ROOT, *Nobel Lecture: Towards Making Peace Permanent*, in ADDRESS ON INTERNATIONAL SUBJECTS 153–74 (Robert Bacon & James B. Scott eds., 1916), available at <http://www.nobel.se/peace/laureates/1912/root-lecture.html> (last visited Sept. 20, 2003).

²⁹ *Id.*

³⁰ See, e.g., Kenneth J. Vandeveld, *Sustainable Liberalism and the International Investment Regime*, 19 MICH. J. INT’L L. 373, 379–99 (1998); Christopher K. Dalrymple, *Politics and Foreign Direct Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause*, 29 CORNELL INT’L L.J. 161, 163–68 (1996); Tali Levy, *NAFTA’s Provision for Compensation in the Event of Expropriation: A Reassessment of the “Prompt, Adequate and Effective” Standard*, 31 STAN. J. INT’L L. 423, 424–39 (1995).

³¹ See 3 GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 655–61 (1940). In the famous exchange between Secretary of State Hull and the Minister of Foreign Relations of Mexico in 1938 the United States insisted that property of its nationals was protected by an international standard under which Mexico was required to pay “adequate, effective and prompt” compensation. The Mexican Minister insisted that international law required only that aliens be granted national treatment and that domestic, not international, law governed the time and manner of payment. The United States prevailed. *Id.* at 660–65.

Thus, if one steps back and takes a longer look, one can certainly assert with confidence that the United States was not only present at the creation, but was a midwife in the birth of the modern era of international arbitration.

II. INTERNATIONAL ARBITRATION AS “*PRAXIS AMERICANA*”?

The other assumption implicit in the title to this conference is that international arbitration is becoming “Americanized” to the exclusion of other influences. While the United States certainly has influenced international arbitration, it would be wholly inaccurate and presumptuous to argue that international arbitration represents the triumph of *Praxis Americana*. International arbitration is not unipolar. The multipolar arrangement of international arbitration reflects the fundamental agreement among the developed and developing world on the need and utility of arbitration to resolve international commercial disputes. “The developed and the developing arbitration world now speaks in the same voice.”³²

Arbitration is exploding in Asia.³³ As the Indian President, Shri K.R. Narayanan put it recently, quoting Gandhi, “[p]eople will take time before they accommodate themselves to arbitration, [for] its very simplicity and inexpensiveness will repel many people even as palates jaded by spicy foods are repelled by simple combinations.”³⁴ If that is so, then we might say that the sophisticated palates of Asians no longer are repelled by the simple fare of arbitration. Statistics from one prominent Asian practitioner reveals that “the growth rates in some Asian jurisdictions over the past decade doubled,” and “in the case of some locations which had single-digit case numbers at the beginning of the decade, the quantity of arbitration cases increased by several multiples.”³⁵ One scholar has argued that “there no longer is any doubt that Asia—and particularly China—has emerged as the world’s leading site for

³² A.C. Muthiah, *Welcoming Address*, in ICCA CONGRESS SERIES NO. 10, INTERNATIONAL ARBITRATION AND THE NATIONAL COURTS: THE NEVER ENDING STORY 1 (Albert Jan van den Berg ed., 2001).

³³ For recent statistics, see Veronica Taylor and Michael Pryles, *The Cultures of Dispute Resolution in Asia*, in DISPUTE RESOLUTION IN ASIA 20–24 (Michael Pryles ed., 2nd ed. 2002).

³⁴ Shri K.R. Narayanan, *Inaugural Address*, in ICCA CONGRESS SERIES NO. 10, INTERNATIONAL ARBITRATION AND THE NATIONAL COURTS: THE NEVER ENDING STORY 7, 8–9 (Albert Jan van den Berg ed., 2001).

³⁵ See Sally A. Harpole, Factors Affecting the Growth (or Lack Thereof) of Arbitration in the Asia Region 1 (2002) (unpublished manuscript, on file with author); see also George W. Coombe, Jr., *The Resolution of Transnational Commercial Disputes: A Perspective From North America*, 5 ANN. SURV. INT’L & COMP. L. 13, 20 (1999).

the conduct of international commercial arbitrations, at least in terms of the volume of new cases filed each year.”³⁶ In support, the author reports that from 1995 to 2000 inclusive, China’s leading international arbitration commission, China International Economic and Trade Arbitration Commission (CIETAC), received 4,200 new international commercial arbitrations and the Hong Kong International Arbitration Centre (HKIAC) received 1394, totaling over 5,500 new arbitrations.³⁷

In Latin America there are also tectonic changes taking place.³⁸ As Horacio Grigera Naón of White & Case has stated, “Latin American countries have radically changed their attitude towards arbitration, which had been traditionally hostile to this form of dispute resolution.”³⁹ As part of government policies promoting private business and integration of national markets, Latin American countries have adopted an entirely new approach to commercial arbitration, with new arbitration laws, accession to key arbitration agreements, and improved local court support for the arbitration process.⁴⁰ Wide ratification of the major arbitration treaties, the adoption of numerous new bilateral and multilateral investment treaties, and new arbitration laws in Brazil, Colombia, Mexico, Peru, and Venezuela, among others, give “eloquent indications of this new trend” strongly favoring arbitration in Latin America.⁴¹ This new attitude is showing marked results in the number of arbitrations involving Latin America. For example, the participation of Latin American parties in the International Chamber of Commerce (ICC) arbitrations has grown dramatically and today averages approximately ten percent of parties to new cases filed each year.⁴²

³⁶ Philip J. McConaughay, *Introduction* to INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA, at xxix (Philip J. McConaughay & Thomas B. Ginsburg eds., 2002). In support, the author reports that from 1995 to 2000 inclusive, China’s leading international arbitration commission, CIETAC, received 4,200 new international commercial arbitrations and the Hong Kong International Arbitration Centre (HKIAC) received 1,394, or 5,594 total. *Id.*

³⁷ *Id.* at xxix–xxx.

³⁸ For a helpful bibliography on arbitration in Latin America, see John P. Bowman & Jack J. Coe, Jr., *Selected Bibliography on Arbitration and Latin America*, June 2003, published in Fourteenth Annual Workshop of the Institute for Transnational Arbitration, *Arbitration and the Courts: A Case Study from Latin America*, June 19, 2003.

³⁹ HORACIO GRIGERA NAÓN, ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN: INTERNATIONAL COMMERCIAL ARBITRATION IN LATIN AMERICA 5 (1997).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See *Spotlight on Dispute Resolution in Latin America*, WHITE & CASE INT’L DISP. RESOL. NEWSL. (White & Case LLP), Mar. 2002, at 2–3.

In Central and Eastern Europe, the favorable investment climate of the past two decades has created an environment in which arbitration is trusted as never before and regularly utilized in international transactions.⁴³ The United States has negotiated bilateral investment treaties with Poland, the Czech and Slovak Republics, Russia, and Bulgaria that include mechanisms for investor-to-State arbitration enforceable under either the International Centre for Settlement of Investment Disputes (ICSID) or New York Conventions.⁴⁴ Recent statistics indicate that arbitration in Central and Eastern Europe is growing at a rapid pace.⁴⁵ A recent survey by the ICC indicates that Eastern Europe is “lead[ing] the charge in arbitration,” with the number of Central and Eastern European parties involved in arbitration growing by 68% in 2001.⁴⁶

Moreover, when one speaks of the great international arbitration institutions the list includes not only the ICC, the London Court of International Arbitration (LCIA), and the American Arbitration Association (AAA), but also CIETAC, the Stockholm Chamber of Commerce, the Singapore International Arbitration Centre, the Australian Conciliation and Arbitration Commission, and the Cairo Regional Centre for International Commercial Arbitration, to name but a few. Major arbitral institutions are now holding conferences throughout the world discussing in great detail the global proliferation of international commercial arbitration.⁴⁷ As Lucy Reed and Jonathan Sutcliffe put it, “international arbitration practice is in fact

⁴³ See, e.g., Kenneth Vandevelde, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT’L L. 621, 637–38 (1993).

⁴⁴ *Id.* at 630–31, 634–35.

⁴⁵ In the Czech Republic, for example, recent statistics indicate a significant increase in international commercial arbitration. See Roman Brncal, Overview of Arbitration Cases by the Arbitration Court Attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic (2003) (unpublished manuscript, on file with author).

⁴⁶ Brendan Malkin, *Eastern Europe Leads the Charge in Arbitration*, LAWYERNEWS, at <http://www.thelawyer.com/cgi-bin/item.cgi?id=105377> (last visited Sept. 20, 2003).

⁴⁷ See, e.g., ICCA CONGRESS SERIES NO. 10, INTERNATIONAL ARBITRATION AND THE NATIONAL COURTS: THE NEVER ENDING STORY (Albert Jan van den Berg ed., 2001); Fourteenth Annual Workshop of the Institute for Transnational Arbitration: Arbitration and the Courts: A Case Study from Latin America (June 19, 2003); Enforcement of Arbitration Agreements in Latin America: papers presented at the 1998 Vancouver IBA Conference, International Bar Association, Vancouver, Canada, (Bernardo M. Cremades ed., 1998).

becoming 'homogenized'—incorporating the best aspects of several traditions"⁴⁸

III. LAW FIRMS AND THE SOFT-POWER ARBITRATION GAME

So if we dispense with these two incorrect assumptions—the mistaken assumption that the United States has only recently become influential, and the second equally misguided assumption that today the United States is overwhelmingly influential to the exclusion of other influences—then we can turn to what I think is an extremely useful inquiry. That inquiry is whether we are reaching a moment in which U.S. influence is at its high tide, extending to backwaters and eddies never reached before.

To this question, I think the answer is almost certainly yes. The first and most significant factor in Americanization of international arbitration is *demographic*: the rise of the Anglo-American law firm.⁴⁹ Just as the United States has been and will be the dominant force in economic globalization, our law firms will be the dominant force in international arbitration. The reason for this seismic demographic shift is the overwhelming success of the Anglo-American law firm in what scholars describe as the "soft-power game."

Soft power is cultural and economic power, and very different from its military kin The United States . . . is definitely in a class of its own in the soft-power game This type of power—a culture that radiates outward and a market that draws inward—rests on pull not push; on acceptance not on conquest [T]his kind of power cannot be aggregated, nor can it be balanced All the[] movie studios [of Europe, Japan, China, and Russia] together could not break the hold of Hollywood. Nor could a consortium of their universities dethrone Harvard et al., which dominate academia while luring the best and the brightest from abroad.⁵⁰

So too we might add that the Anglo-American law firms are in a class by themselves in the soft-power game. The muscle of all of the other law firms of the world put together cannot match the attractive allure of these firms. It is their soft power—a power that rests on the magnetic attraction these firms

⁴⁸ Reed & Sutcliffe, *supra* note 1, at 36.

⁴⁹ I use the phrase "Anglo-American law firm" rather than American law firm because it more accurately reflects the reality that the common law, vertically integrated, globalized, general service law firms are virtually identical in style, scope, structure and influence.

⁵⁰ Josef Joffe, *How America Does It*, 76 FOREIGN AFFAIRS Sept./Oct. 1997, at 13, 24.

hold on legal service providers and consumers—that will ensure that they will be the defining feature in the future of international arbitration.

Indeed, the common lamentation of local lawyers in almost every major legal market in the world is the “Anglo-American invasion” in their legal markets, stirring the once placid waters of their country’s practices. From the very heart of international arbitration in Paris, France we hear a *cri de coeur* of French law firms struggling mightily to compete in the soft-power arbitration game. According to a Chambers Global publication on the “World’s Leading Lawyers,” the trend in the French legal market has been the concurrent decline of the traditional Franco-French firm, with its emphasis on individual superstars, and the rise of the Anglo-American firm, with its emphasis on tight organizational structure and teamwork.⁵¹ Their survey identifies seven of the top eight leading arbitration practices in France to be in Anglo-American law firms.⁵² Even the lone French firm, Salans, is an anomaly. Its founders include the American name partner, Carl Salans, and it merged with a British firm in 1998 and an American firm in 1999.⁵³

Similarly, a recent survey by *International Commercial Litigation* identified the top arbitration law firms in the world based on number of cases, total value of cases, average claim size, industries covered, and hearings heard.⁵⁴ Of the nineteen law firms surveyed, Anglo-American law firms dominated. On average, seven of the top ten law firms in each category were Anglo-American law firms. For example, when evaluated based on the number of cases in a law firm’s portfolio, eight of the top ten firms were Anglo-American.⁵⁵ When ranked based on the number of hearings, seven of the top ten law firms were Anglo-American.⁵⁶ In short, by whatever methodology one ranks law firms practicing international arbitration—volume, size, industry diversity, number of hearings—this survey suggests that Anglo-American law firms are king of the mountain.

⁵¹ CHAMBERS GLOBAL: THE WORLD’S LEADING LAWYERS 2001–2002, at 261–63 (James Fairweather ed., 2001).

⁵² Of the top eight, four are American, (1) Shearman & Sterling, (2) White & Case LLP, (3) Coudert Frères, and (4) Jones, Day, Reavis, & Pogue; three are British, (1) Freshfields Bruckhaus Deringer, (2) Herbert Smith, and (3) Norton Rose; and one is French, Salans. *Id.*

⁵³ See *History of the Firm*, Salans Firm Overview, at http://www.salans.com/firm/firm_overview_frmset.html (last visited Sept. 20, 2003).

⁵⁴ David Samuels, *The New Periodic Tables*, in INTERNATIONAL COMMERCIAL LITIGATION 16–20 (1999).

⁵⁵ *Id.*

⁵⁶ *Id.*

These results mirror a more recent survey in *The American Lawyer*, which identified the top forty arbitrations in Europe.⁵⁷ Although each dispute featured a European forum or at least one European party, in the overwhelming majority of cases it was Anglo-American law firms that the parties chose to represent them.

Young, aspiring lawyers across the globe recognize this trend and hope to ride the wave with American LL.M. degrees and C.V.'s touting American law firm experience. As a result, the second great American influence today is *legal training*. The brightest foreign talent recognizes that Anglo-American law firms are one of the best avenues to begin their budding careers. These young international lawyers flock to American law schools to secure LL.M. degrees to increase their marketability. At these law schools non-Americans secure a firm grounding in American law and legal culture, and their careers are shaped accordingly. For example, at my alma mater, New York University School of Law, students from fifty-five countries have studied and obtained degrees, and foreigners typically make-up a significant majority of the class. In the 2001-2002 academic year, 68% of the full-time graduate students were from foreign countries and 150 foreign law schools were represented among the class.⁵⁸ Pursuit of the American LL.M. leads directly to pursuit of large law firm employment. Each January, NYU, together with thirty other law schools, holds an International Student Interview Program for foreign-trained lawyers pursuing graduate degrees in the United States. Last year several hundred foreign law students interviewed with over 125 U.S. and foreign employers.⁵⁹ For many aspiring arbitrators, the path to lucrative employment requires a pilgrimage to American law schools. Indeed, the law school where I teach, Pepperdine University in Malibu, California, is so confident that there is significant demand for such training that it has established an LL.M. program exclusively devoted to dispute resolution.

The influence of Anglo-American law firms in the great centers of international arbitration—London, New York, Paris—has brought with it uniquely common law cultural and professional influences. The third, and perhaps the most notable, American influence in the practice of international arbitration relates to *style*. As Alan Redfern and Martin Hunter put it,

⁵⁷ Michael D. Goldhaber, *Big Arbitrations*, THE AMERICAN LAWYER MEDIA SUPPLEMENT: FOCUS EUROPE, Summer 2003, at 22.

⁵⁸ See NYU Office of Admissions, at <http://www.law.nyu.edu/depts/admissions/info/graduate/foreign.html> (last visited Sept. 20, 2003).

⁵⁹ See NYU Office of Career Counseling and Placement, at <http://www.law.nyu.edu/depts/careerservices/recruiting/index.html> (last visited Sept. 20, 2003); Telephone Interview with NYU Office of Career Counseling and Placement (March 18, 2003).

whether arbitration procedures follow the common law adversarial model or civil inquisitorial model will depend “not so much on the place where the arbitration is conducted, but more on the background and experience of the individual members of the arbitral tribunal and the parties’ advisers.”⁶⁰ The growing influence of American law firms suggests the increased use of a common law adversarial style of international arbitration.

In the early part of the 20th century, the so-called “Reformation period” of American arbitration,⁶¹ advocates urged more robust use of arbitration in the United States to avoid “needless contention that [is] incidental to the atmosphere of trials in court.”⁶² But arbitration today is no longer free from such needless contention. In particular, concerns have been expressed that arbitration is “Americanized” when counsel engage in “brass knuckle” tactics that are so alarmingly familiar in American courts.⁶³ It is quite common now for sophisticated American litigators to assume that international arbitration is simply “offshore litigation,”⁶⁴ and that they can “do” international arbitration by applying the skills learned in the courtroom.⁶⁵ Whether the skills are transferable or successful in international arbitration is not the point. With the overwhelming influence of American law firms on the global scene, the fact that these tactics are tried is altering the atmosphere of international commercial arbitration. It is more likely that the American style is not a scorched earth mentality—not because American practitioners are not willing to utilize this approach, but because they will rarely perceive it as effective or necessary. It is again more likely that the American style represents a tactical battle that will utilize *all* arrows that a seasoned American litigator has in his or her quiver, with some arrows sharper than others.

⁶⁰ ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 282 (1999).

⁶¹ MACNEIL, *supra* note 5, at 34–58.

⁶² Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 614 n.44 (1928).

⁶³ Ulmer, *supra* note 1, at 24–25. “Americanization” is often a:

code word for an unbridled and ungentelemanly aggressivity and excess in arbitration. It can involve a strategy of “total warfare”, the excesses of US-style discovery, and distended briefs and document submission . . . I have sometimes seen this type of “Americanization” accusation to have merit . . . [b]ut this is the exception, . . . and “total war”, in and of itself, is an unintelligent arbitration strategy.

⁶⁴ REDFERN & HUNTER, *supra* note 60, at 283.

⁶⁵ Reed & Sutcliffe, *supra* note 1, at 36.

A fourth significant American influence concerns *discovery*. Many American lawyers fail to fully appreciate the uniqueness of American discovery techniques. Discovery in international arbitration has adapted to incorporate many of tools familiar in American litigation. As counsel, American lawyers are encouraging the use of American approaches to discovery—depositions, interrogatories, cross-examination—with increased frequency. As arbitrators, American arbitrators are more comfortable with such techniques and willing to acquiesce to such requests. In addition, as civil law lawyers gain experience in Anglo-American discovery techniques, they too will utilize and advocate these approaches if it suits their clients' needs.⁶⁶ Finally, as institutional leaders, Americans are influencing the approach taken in adopting and revising arbitration rules, such as the International Bar Association Rules of Evidence. The most hotly debated issue in drafting these rules pertained to the discovery of documents in the possession of the opposing party.⁶⁷ The common law lawyers won this debate, with Article 3 requiring a party to produce, pursuant to an arbitral order, all requested documents in its possession.⁶⁸

A fifth American influence is *choice of law*. American law firms are at the forefront in drafting complex international contracts, and anecdotal information indicates that New York law is fast approaching English law as the preferred choice of law for international transactions. This includes not only major infrastructure transactions, joint ventures, and the like, but New York is also making inroads even in areas such as maritime law, in which English law has always dominated. This is not particularly surprising. Parties normally choose the law of one of the contracting parties, or a respected, neutral third country. New York law (or some other U.S. state law) often will be chosen because it is the contract law of one of the contracting parties or their counsel. Often, it will be the contracting party with the greatest leverage to impose their applicable law. And if New York law is not the law of one of the contracting parties, it is viewed, along with English and Swiss law, as one of the most respected, neutral third country laws. Moreover, U.S. courts will

⁶⁶ Ulmer, *supra* note 1, at 24–25.

⁶⁷ IBA WORKING PARTY, COMMENTARY ON THE NEW IBA RULES OF EVIDENCE 5 (1999), available at http://www.ibanet.org/pdf/comment_rules.pdf (last visited Sept. 20, 2003).

⁶⁸ Article 3(4) of the IBA Rules of Evidence provides that “[w]ithin the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the Arbitral Tribunal and to the other Parties all the documents requested in its possession, custody or control as to which no objection is made.” See INTERNATIONAL BAR ASSOCIATION RULES OF EVIDENCE, art. 3(4) (1999), available at <http://www.ibanet.org/pdf/rules-of-evid-2.pdf> (last visited Sept. 20, 2003).

almost invariably enforce such choice of law clauses. In keeping with the strong federal policy favoring arbitration, U.S. courts will grant almost unfettered discretion to the parties to choose whatever law they desire, recognizing that such choice of law clauses are an “almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.”⁶⁹

A sixth American influence relates to *venue*. By venue, I mean not only the *situs* of arbitration, but also the *situs* for enforcement. The overwhelming pro-arbitration policy reflected in Supreme Court decisions such as *Prima Paint*, *Scherk*, *Southland*, and *Mitsubishi*, to name but a few, has created a hospitable judicial environment in which arbitration is allowed to thrive, so much so that the United States is viewed as an extremely favorable *situs* to conduct arbitration proceedings and to enforce awards. Although many will appreciate the pro-arbitration policy reflected in U.S. jurisprudence, it bears repeating just how liberal that policy is. In *Prima Paint*, the Court avoided lengthy pre-arbitration litigation regarding the enforceability of an arbitration agreement by establishing the “separability doctrine” to address allegations of fraud in the inducement.⁷⁰ On arbitrability, *Mitsubishi* holds that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”⁷¹ In *Scherk* the Supreme Court recognized the potential “damage [to] the fabric of international commerce and trade” if this country parochially refuses to enforce international arbitration agreements.⁷² And in *Southland*, the Supreme Court responded to the old common law hostility toward arbitration and the failure of state arbitration statutes to mandate enforcement of arbitration agreement by finding that the FAA is applicable in

⁶⁹ *Scherk v. Alberto-Culver, Co.*, 417 U.S. 506, 516 (1974); *see also* *Northrop Corp. v. Triad Int'l Mktg S.A.*, 811 F.2d 1265, 1270 (9th Cir. 1987) (holding that choice of law clauses should be enforced absent strong reasons to set them aside); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1293, 1295 (11th Cir. 1998) (finding that “international agreements—even those that render United States securities law inapplicable—are *sui generic*”). To invalidate choice provisions in Lloyd's contract would be to conclude that the reach of the United States securities laws is unbounded; “because we are unwilling to so conclude, we hold that the anti-waiver provisions of the United States securities laws do not categorically render unenforceable the Lloyd's choice clauses.” *Id.* WILLIAM F. FOX, JR., *INTERNATIONAL COMMERCIAL AGREEMENTS: A PRIMER ON DRAFTING, NEGOTIATING, AND RESOLVING DISPUTES* 151–53 (3d ed. 1998).

⁷⁰ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967).

⁷¹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

⁷² *Scherk*, 417 U.S. at 517.

state courts.⁷³ As the Supreme Court put it, in a few short decades we have gone from a "suspicion of arbitration as a method of weakening the protections afforded in the substantive law" to a "strong endorsement of the federal statutes favoring this method of resolving disputes."⁷⁴

The United States is, however, a preferred venue not only because of a favorable judicial climate, but also because of opportunity. The overwhelming economic might of the United States will often create an opportunity for in rem attachment of assets to enforce foreign arbitral awards. To the extent that the United States is one of the premier financial markets in the world, one of the premier inbound markets in the world, *and* one of the premier outbound suppliers of goods and services abroad, it follows that all manner of companies have assets in this country that may be attached for purposes of enforcing arbitration awards.

A seventh American influence concerns *published precedent*. The confidential nature of most international commercial arbitration enhances the attractiveness of this mechanism of dispute resolution, but it also greatly diminishes the pool of available materials one can use as persuasive authority. The most important body of international arbitration jurisprudence emanates from an institution that has a distinctly American influence: the Iran-United States Claims Tribunal. The significance of these decisions as persuasive authority is second to none. A second body of published precedent, NAFTA Chapter 11 awards, is quickly becoming an important source of international arbitration jurisprudence. It too has the American imprint. At a recent conference in New Zealand one of the most eminent European arbitrators privately expressed sheer delight to me that he could *finally* discuss his work as an arbitrator because the NAFTA award he rendered, like all NAFTA awards, is in the public domain. Decades of work on other arbitration matters, he said, are in a black box, unexamined and inscrutable.

An eighth influence is *language*. English has become the *lingua franca* of international arbitration. One prominent arbitrator, Jan Paulsson, recently noted that that "[t]en years ago, half my cases were in French and half in English. Now, it's ninety percent English."⁷⁵ Anglo-American law firms and the English language are a pair, each symbionts of the other. The growth of Anglo-American law firms fosters the dominance of English in arbitration, and the dominance of the English language encourages ever more clients to

⁷³ Southland Corp. v. Keating, 465 U.S. 1, 10-17 (1984).

⁷⁴ Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 481 (1989).

⁷⁵ Michael Goldhaber, *The Court that Came in from the Cold*, THE AMERICAN LAWYER, May 2001, at 98, 101.

seek Anglo-American counsel. For example, in the multi-billion euro dispute between Deutsche Telekom and France Telecom we witnessed a continental family feud that was resolved in European fora with the score kept in euros and arbitrators from Denmark, Belgium, France, Italy, and Sweden applying the laws of Germany, France, Italy, Belgium, Switzerland, and the European Community.⁷⁶ The lead lawyers were Americans Gary Born of Wilmer, Cutler & Pickering and Eric Schwartz of Freshfields Bruckhaus & Deringer. According to Gary Born, “[w]hat I brought to the case was expertise in the truly international process that has grown up to deal with that kind of mess, and the ability to argue persuasively in English.”⁷⁷

A final American influence is more subtle and relates to *institutional personnel*. Americans are over-represented at the major arbitration institutions. For example, at the International Chamber of Commerce in Paris, three of the past four Secretaries-General have been Americans. The fourth, Horacio Grigera Naón, joined the American law firm of White & Case following his tenure at the ICC. Americans are often disproportionately represented at other key arbitration institutions, such as the Permanent Court of Arbitration, the Claims Resolution Tribunal, the World Trade Organization, the Iran-United States Claims Tribunal, the International Centre for Settlement of Investment Disputes, and the United Nations Compensation Commission, to name but a few. On more than one occasion I have heard hiring personnel at certain key arbitration institutions lament their inability to hire qualified American attorneys because Americans were already over-represented at their institution. Moreover, many of the personnel at these institutions, be they American or otherwise, come from or depart to American law firms, further enhancing the influence of these firms.

IV. CONCLUSION

So is international arbitration becoming “Americanized”? Although many will say no, I think the demographics suggest the answer is yes. As I am writing from Malibu, perhaps you will allow an analogy from Hollywood. As you perhaps will recall, cinema was born in Paris on December 28, 1895 when the Lumieres brothers presented their first commercial motion picture. Much of the early history of film has its roots in Europe rather than the United States. The greatest films were German, the best editing techniques were Russian, and much of the best equipment was developed in France. But it was the establishment in the 1920s of major

⁷⁶ *Id.*

⁷⁷ *Id.*

Hollywood motion picture studios—Warner Bros, MGM, RKO, Paramount, and Fox—with their vertical integration and factory system of production that led to the golden age of Hollywood. These studios created an economic juggernaut that assimilated the best and the brightest artists and directors from Europe: Ernst Lubitsch, Pola Negri, Victor Seastrom, and Greta Garbo. Today we all know that the United States is the dominant force in film. This is not to say that there are not great films from India, or great actors from Australia, or great film festivals in France. But the film *industry*, for several decades now, has become Americanized.

Today we are experiencing the dawn of the golden age of the Anglo-American law firm. While the elder statesmen of international arbitration are largely European, the Anglo-American juggernaut we know as the modern international law firm is the defining feature affecting the industry today. With their tight organizational structure, integrated services, global network of offices, and team mentality, these firms dominate international legal practice, including international arbitration. Not surprisingly, much of the greatest young arbitration talent from across the globe aspires—or at least is sorely tempted—to affiliate with these firms. And it is this aspiration, and its realization, that will result in the Anglo-American law firm being the dominant force in international arbitration in the coming decades. And with it, we will see the Americanization of international arbitration reach its high-water mark.